United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1078

To Be Argued By:

15 Minutes

PETER J. FABRICANT

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1078

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JEROME DANIELS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

JEROME DANIELS

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JEROME DANIELS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where there is a serious question as to whether Appellant can survive confinement due to his medical condition, and the Court has held a fact-finding hearing in which there was presented uncontraverted evidence that the Appellant suffers from arteriosclerotic heart disease, hypertension, diabetes, schizophrenia, and chronic paranoia, and there is a distinct possibility that Appellant's life expectancy would be materially shortened by confinement, did the Court commit error by finding that the Appellant's medical condition would allow him to survive confinement?

2. Where the Appellant is a passive participant in the crime to which he has pleaded guilty, and has cooperated

extensively with the government in ferreting out crime, even to the extent of placing his life in jeopardy, did the Court commit error by reliance for sentencing on a Count of the Indictment that was dismissed, and by failing to state on the record the reasons that the Court was imposing a prison sentence?

HISTORY OF THE CASE

The Appellant JEROME DANIELS appeals from a conviction after plea of guilty of the crime of "giving an unlawful gratuity" in violation of Title 18, United States Code, Sections 201(f), 2. He was sentenced to a conditional term of six (6) months imprisonment and a fine of $5,000 on December 9, 1975. The period of confinement was reduced to three (3) months and the fine was vacated on February 18, 1976. (Henry Bramwell, U.S.D.J.).

THE FACTS

On December 16, 1974, Appellant was indicted, along with co-defendant Phillip Kaplowitz, in the United States District Court for the Eastern District of New York, and was charged with the crimes of income tax evasion, bribery of an Internal Revenue agent, and giving an unlawful gratuity to an Internal Revenue agent.

On September 22, 1975, each defendant pleaded guilty before Judge Henry Bramwell to the crime of giving an unlawful gratuity, which is punishible by a prison sentence of up to two (2) years and a fine of up to $10,000.

On November 28, 1975, co-defendant Kaplowitz was sentenced to one year imprisonment, of which all but two (2) months were suspended, and probation for two (2) years.

On December 9, 1975, Appellant appeared before Judge Bramwell for sentencing. By this time, the Court had received numerous letters from Appellant's doctors attesting to the critical condition of Appellant's health.(12/9 Transcript, p. 11).

Dr. Joseph Martorano, a psychiatrist who had been treating Appellant even before the commission of the crime in question, wrote a letter in which he stated that the Appellant has had "a chronic debilitating case of paranoia since the age of fifteen. . ." The doctor related that Appellant could not enter the hospital for prolonged treatment because it was felt that his cardiac condition was so weak that if he were forced to enter a hospital his heart would decompensate and he might die of the stress. Dr. Martorano went on to state that Appellant was a critically ill man whose life prognosis, because of his cardiac status, is severely limited to, at best, a few years, and whose mental condition is such that it will eventually deteriorate, because of his lifelong paranoia, if placed under stress. Dr. Martorano concluded his letter to Judge Bramwell as follows: "It is quite probable medically that even minimal institutionalization would cause severe mental and cardiac decompensation to the extent that it would unfairly punish the defendant by causing a precipitous, premature death." (Martorano, 9/17).

Dr. Martorano wrote a follow-up letter to Judge Bramwell in which he stated that Appellant's condition was deteriorating and that "a jail sentence might well result in an unavoidable premature death." (Martorano, 12/2).

Another psychiatrist, Dr. Albert J. Lobell, also wrote to Judge Bramwell, and stated that Appellant had been under his care since before the occurrence of the crime to which Appellant pleaded guilty. His medical diagnosis of Appellant was schizophrenia with depression, hypertension, angina pectoris, and diabetes mellitus. Dr. Lobell concluded that Appellant's "mental condition is unstable and additional stress, such as confinement to prison, would be very detrimental." (Lobell, 9/20).

The Court also received a letter from an internist, Dr. E. Leslie Chusid, who wrote that Appellant was under his care for hypertension, diabetes mellitus, and hypercholesterolemia, and that Appellant was totally disabled. Dr. Chusid concluded his letter as follows: "It is in my professional opinion that imprisonment would probably cause complete physical and mental breakdown and probably premature death." (Chusid, 9/20).

Finally, Judge Bramwell received a letter from Appellant's brother, Marvin Daniels, who is a registered psychologist and a Clinical Professor of Psychology at Adelphi University. Dr. Daniels outlined Appellant's long history of mental disease and predicted a psychotic breakdown - with accompanying

physical deterioration - were he to be confined to prison. (Daniels, 9/13).

At the sentencing, Paul E. Warburgh, Jr., who represented Appellant, reiterated to the Court that Appellant was merely a passive participant in the crime to which he had pleaded guilty, and that Mr. Kaplowitz, the co-defendant, played the more active role in the commission of the crime. (12/9 Tr., p. 11). As appears from the statements of the Appellant at the time of plea, Mr. Kaplowitz was the prime mover in the crime, and it was Mr. Kaplowitz who initiated the meetings with the Internal Revenue agents, suggested the payment of a bribe, and in fact actually paid the bribe and then sought out Appellant for reimbursement. (9/22 Tr., pp. 9-13).

At the time of the initial sentencing of Appellant, Judge Bramwell had received several letters from the Organized Crime and Racketeering Section, Joint Task Force, United States Department of Justice, attesting to the extensive cooperation that Appellant had afforded this prosecutorial agency.

Special Attorney David J. Ritchie wrote that Appellant was assisting on several substantial investigations, and that "he has shown a desire to mend his ways and to make up for his past crime." Mr. Ritchie also noted that Appellant's serious medical problems substantially ante-dated the onset of his legal difficulties. (Ritchie, 10/24).

Special Attorney Steven K. Frankel wrote about App-

ellant's close cooperation with his agency, and ended his letter by stating that ". . . it is our belief that the incarceration of Mr. Daniels would serve no constructive purpose, and would instead remove him from the position where he can continue to gather intelligence information for the Government." (Frankel, 10/22).

At the time of sentence, Mr. Frankel expressed concern about Appellant's physical and psychological health, (12/9 Tr., p. 11a), and Mr. Ritchie reiterated his feeling that Appellant was atoning for the crime he had committed, and told the Court that Appellant was in danger to his person as a result of his cooperation with the Government. (12/9 Tr., p. 12).

Judge Bramwell stated that he was "disturbed" by the physicians' letters that he had received, and he felt that "there is a serious question as to whether this defendant can survive confinement due to his medical condition." (12/9 Tr., pp. 13, 16-17).

The Court then conditionally sentenced Appellant to a term of six (6) months imprisonment and a fine of $5,000. He committed Appellant to the Metropolitan Correctional Center for a period of four (4) days "for a study and report as described in Section 4208(b) and (c) of Title 18, United States Code. . ." (12/9 Tr., p. 16).

The Court directed that Appellant be examined in prison and that after the examination the Court would either confirm

the sentence already imposed or would modify it in accordance with 18 U.S.C. 4208(b). (12/9 Tr., p. 16).

At the conclusion of the sentencing, the Court dismissed the remaining Counts in the Indictment pending against Appellant. (12/9 Tr., p. 17).

On January 23, 1976, Judge Bramwell adjourned the case to February 11, 1976, for purposes of a fact-finding hearing to determine whether or not Appellant's medical condition would allow him to survive confinement in prison. Because of the possible unavailability of Appellant's physicians, Judge Bramwell agreed to accept letters from any doctors who were unable to attend court, in lieu of live testimony.

On February 11, 1976, Dr. Chusid was available to appear in court (2/18 Tr., p. 3; Chusid, 2/17; 2/18 Tr., pp. 37-38), but the case was adjourned by Judge Bramwell because he was actually engaged on the trial of another matter.

On February 18, 1976, the fact-finding hearing was held before Judge Bramwell.

The prosecution first called Dr. Naomi Goldstein, a psychiatrist who had examined Appellant while he was incarcerated. She diagnosed Appellant as "schizophrenic reaction, chronic, paranoid type, and a depressive reaction." (2/18 Tr., p. 5). She classified Appellant as a borderline psychotic. (2/18 Tr., p. 9).

Noting that Appellant had previously attempted suicide, Dr. Goldstein testified that if Appellant were incarcerated, there would be a potential for suicide, and the incarceration could be detrimental to his health. (2/18 Tr., p. 7). Even if Appellant did not commit suicide while in prison, there would be a possibility of decompensation, arising from the need for Appellant to cope with a stressful situation. (2/18 Tr., p. 9).

On cross-examination, when asked whether she agreed with Dr. Martorano's statement that ". . . placing this patient in an institution may have the terribly undesirable effect of bearing him a totally decompensated chronic psychotic for the remainder of his life.", Dr. Goldstein answered "yes". (2/18 Tr., pp. 10-11).

Although Dr. Goldstein was reluctant to make any predictions, she did testify, in regard to Appellant's incarceration: "It would be detrimental. It's a very stressful situation, and for the moment we would have to deal with the possibility of more serious problems." (2/18 Tr., p. 11.).

Dr. Goldstein declined to predict, one way or another, whether or not Appellant would die if he were incarcerated. (2/18 Tr., p. 14).

Dr. Goldstein testified that she thought the Bureau of Prisons could take care of Appellant's needs, because "the Bureau of Prisons is prepared to deal with any type of problem." (2/18 Tr., p. 6). She stated that Danbury Correctional

Institution, where Judge Bramwell subsequently recommended that Appellant serve his sentence, had two psychiatrists to attend an inmate population of six hundred. (2/18 Tr., p. 7-8).

The other witness who testified on behalf of the prosecution was Dr. Anthony J. Ruggiero, a physician who examined Appellant in jail.

Dr. Ruggiero's physical examination of Appellant took fifteen or twenty minutes, (2/18 Tr. p. 20), and he could not remember the results of the urine analysis, even though the Appellant is a diabetic. (2/18 Tr., p. 21).

Dr. Ruggiero diagnosed Appellant as suffering from "cardiovascular hypertensive heart disease, diabetes mellitus, obesity, anginal syndrome, coronary artery disease." (2/18 Tr., p. 17). He stated that there was a possibility that Appellant would suffer a heart attack if incarcerated (2/18 Tr., p. 21), that the stress of incarceration would increase such possibility (2/18 Tr., p. 22), and that because Appellant had suffered from two previous heart attacks and had high blood pressure, the chances of a heart attack in prison were much greater than for a normal inmate. (2/18 Tr., p. 24).

As in the case of the previous witness, Dr. Ruggiero would not predict whether or not Appellant would die if he were incarcerated. (2/18 Tr., p. 23).

Dr. Ruggiero gratuitously credited Appellant's obesity as the cause of his prior heart attacks, although there is no evidence that Dr. Ruggiero was aware of Appellant's weight

at the time of the prior coronary attacks. (2/18 Tr., pp.22-23).

Dr. Ruggiero testified that Appellant could "certainly" be cared for in the Federal Prison System, and that Danbury Correctional Institution had a prison hospital. (2/18 Tr., p. 18, 20).

Finally, the prosecution offered into evidence a letter written by the Warden of the Metropolitan Correctional Center, which in essence was a recapitulation of the testimony of the two doctors who had examined Appellant at that institution. The Warden's letter attempts to minimize Appellant's physical infirmities, but does state that Appellant's psychiatric prognosis and capacity appear to be poor, and that Appellant is definitely agitated and suicidal. The Warden's conclusion is that Danbury Correctional Institution would be capable of handling this type of patient. (Warden, 12/15; 2/18 Tr., pp. 28-31).

Because of the unavailability of Appellant's physicians, Appellant submitted letters from three doctors in lieu of oral testimony. All of these doctors had been treating Appellant for a number of years, and all indicated in their letters that they had read the report of the Warden of the Metropolitan Correctional Center. (As well as appearing in the transcript of the February 18, 1976, hearing, these letters are included in the Appendix to this Brief).

Dr. Joseph T. Martorano stated in his letter that Appellant had an active psychotic state combined with a severe

depression, and that "the depressive state will most likely deteriorate under any type of confinement and should precipitate a stronger suicidal drive which the patient can not even presently control."

Dr. Martorano concluded that Appellant's severe psychotic state would undoubtedly decompensate under the stressful situation of incarceration, and that "placing this patient in an institution may have the terribly undesirable effect of bearing him a totally decompensated chronic psychotic for the remainder of his life." (2/18 Tr., pp. 32-35).

Dr. Nicholas Pace wrote that Appellant had a very serious psychiatric history of depression with suicidal tendencies, two previous heart attacks, severe angina pectoris, hypertension, and diabetes.

Dr. Pace noted that with the anxiety of the pending jail sentence, Appellant was suffering from angina attacks and continued high blood pressure in spite of intensive medical therapy. He concluded that incarceration of any kind may lead to a cerebral hemorrhage or another coronary occlusion, and that Appellant's "reaction to even minimal incarceration may have disastrous results on his health." (2/18 Tr., pp. 35-36).

Finally, the Court received into evidence a letter from Dr. E. Leslie Chusid, Associate Clinical Professor in Medicine and Director of Respiratory Therapy at Mount Sinai Hospital in New York City, who had treated Appellant since 1971.

Dr. Chusid's letter concluded as follows in regard to Appellant's medical condition:

"Taken out of the environmental surroundings of his family, this pathetic individual has demonstrated to me in the past rapid deterioration of his depressive reaction and his diabetic - hypertensive state. The amount of medication he is required to take makes him vulnerable to extraneous factors, especially unfamiliar stress. His lifespan is going to be short as is; the placement in an institution outside his home, in my estimation, would have the greatest possibility of inducing further premature death." (2/18 Tr., pp. 36-38).

At the conclusion of the hearing, Judge Bramwell ruled as follows:

"After having completed the hearing, the Court accepts the conclusions from the doctors and the Warden at the Metropolitan Correctional Center, and the Court knows of the possibility that there may be a deterioration in the health of Mr. Jerome Daniels, but the Court feels that the Federal Bureau of Prisons has the facilities to provide medical and psychiatric treatment and assistance to Mr. Daniels in connection with his incarceration." (2/18 Tr., pp. 38-39).

The Court then proceded to re-sentence Appellant. Judge Bramwell noted that he had received a letter from Maurice H. Nadjari, Special New York Prosecutor, who wrote that Appellant was affording extensive cooperation in a major investigation of corruption in the criminal justice system in

New York City. (2/18 Tr., p. 40)(Nadjari, 1/21).

The Court then permitted Thomas McDermott, Special Assistant Attorney General in the office of Mr. Nadjari, to state on the record that Appellant was currently cooperating an an important investigation, and that his cooperation had been extensive, truthful, and "one hundred per cent candid". (2/18 Tr., pp. 40-42).

Although Appellant's attorney requested Judge Bramwell to impose a sentence of Probation or incarceration in a Half-Way House so that Appellant could continue treatment from his physicians, the Court finally sentenced the Appellant to a reduced term of three (3) months imprisonment and vacated the previously imposed fine of $5,000. The Court recommended that Appellant serve the sentence at the Northeast Region Psychiatric Referral Center at the Danbury Correctional Institution. (2/18 Tr., pp. 43-47).

On February 24, 1976, the United States Court of Appeals for the Second Circuit granted a motion by Appellant to stay the execution of sentence pending appeal.

POINT ONE

THE COURT COMMITTED ERROR BY FINDING THAT THE APPELLANT'S MEDICAL CONDITION WOULD ALLOW HIM TO SURVIVE INCARCERATION

Appellate review of fact-finding by a District Court Judge is ordinarily governed by Rule 52(a) of the Federal Rules of Civil Procedure, which states in part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." F.R.C.P. Rule 52(a).

As defined by the United States Supreme Court, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), rehearing denied, 333 U.S. 869.

It is respectfully submitted that under the above standard the District Court was clearly erroneous in finding that the physical and mental health of Appellant would allow him to be incarcerated without a substantial possibility of death.

But this Court need not find the District Court to be clearly erroneous to reverse the decision of Judge Bramwell.

The"clearly erroneous" doctrine is subject to modification and does not apply where the Appellate Court is in as good a position as the lower Court to evaluate the testimony that is crucial to the case. Caradelis v. Refineria Panama, S.A., 384 F.2d 589 (5th Cir. 1967).

It is particularly when documentary evidence and depositions form the basis for the Court's finding of fact that such findings do not attain to that degree of finality which findings resolving issues of credibility would. Shumaker

v. Groboski Industries, In., 352 F.2d 837 (7th Cir., 1965); see also Best Medium Publishing Company v. National Insider, Inc., 385 F.2d 384 (7th Cir. 1967), cert. denied, 390 U.S. 955, rehearing denied, 390 U.S. 1008; United States ex rel. Binion v. O'Brien, 273 F.2d 495 (3rd Cir. 1959), cert. denied, 363 U.S. 812; Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954).

The fact-finding hearing in the instant case presented a combination of oral testimony and doctor's letters which were accepted into evidence in lieu of oral testimony. The applicable case in the Second Circuit is Orvis v. Higgins, 180 F.2d 537 (2nd Cir. 1950), cert denied, 340 U.S. 810:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances." Orvis at 539-40.

It is respectfully submitted that the fact-finding hearing conducted by Judge Bramwell falls into the Orvis (b)(1) category; that is, the Appellate Court may ignore the judge's finding and substitute its own because the written

evidence and the undisputed facts render the credibility of the oral testimony extremely doubtful.

The undisputed facts are as follows:

1. The Appellant is suffering from cardiovascular hypertensive heart disease, diabetes mellitus, obesity, anginal syndrome, and coronary artery disease. This a conceded by Dr. Ruggiero, the government witness (2/18 Tr., p. 17), and by the report of the Warden of the Metropolitan Correctional Center (2/18 Tr., pp. 29-31).

2. The Appellant has a schizophrenic reaction, chronic, paranoid type, and a depressive reaction. This is apparent from the various letters of Dr. Martorano and the testimony of the government psychiatrist, Dr. Goldstein. (2/18 Tr., pp. 5, 9).

The only difference in opinion between the government physicians and Appellant's own physicians deals with the likelihood of Appellant's death if he were to be incarcerated. While the doctors who have treated Appellant for many years uniformly state that there is a substantial possibility that Appellant's life expectancy would be considerably diminished if he were imprisoned, both government doctors testified that the facilities at Danbury Correctional Facility could take care of Appellant's needs.

However, neither government doctor would state an opinion as to the likelihood of Appellant's life being shortened by

a period of incarceration. (2/18 Tr., pp. 14, 23.). It is submitted that the failure of the government doctors to render an opinion on the Appellant's life expectancy renders their credibility extremely doubtful.

Because there was no testimony other than general, unsubstantiated statements that the Bureau of Prisons could "take care of" Appellant, the letters submitted by Appellant's doctors were virtually undisputed, and the Court's decision had no rational basis.

It is submitted that this Court of Appeals is in as good position to make a fact-finding as the District Court, and should review the record and reverse the finding of the District Court.

POINT TWO

THE COURT COMMITTED ERROR BY RELIANCE ON IMPROPER CONSIDERATIONS IN SENTENCING APPELLANT AND BY FAILING TO STATE THE REASONS FOR THE IMPOSITION OF A PRISON SENTENCE

Although for many years it was Hornbook law that a Federal Appellate Court could not disturb the sentence imposed by a District Court Judge, as long as it was within the statutory maximum, the "law is in the process of change". 2 Wright, Federal Practice and Procedure, p. 540 section 553.

The United States Supreme Court has held that there was a denial of due process of law where the sentence was based on assumptions concerning the defendant's record that were materially false. Townsend v. Burke, 334 U.S. 736 (1948).

Likewise, this Court has reviewed sentences where the basis for the imposition of the sentence was erroneous information. United States v. Malcolm, 432 F.2d 809 (2nd Cir. 1970); McGee v. United States, 462 F.2d 243, 247 (2nd Cir. 1972).

This Court has held that where the District Court's sentencing is "so manifest an abuse of discretion as to violate traditional concepts", the Court of Appeals may review the sentence as part of its power to supervise the administration of justice in the circuit. United States v. Holder, 412 F.2d 212, 214-215 (2nd Cir. 1969). See also the following cases where it is implied that abuse of judicial discretion is a sufficient predicate on which to base appellate review: United States v. Brown, 470 F.2d 285 (2nd Cir. 1972); United States v. Needles, 472 F.2d 652 (2nd Cir. 1973).

A fairly recent case, United States v. Velazquez, 482 F.2d 139 (2nd Cir. 1973), holds that there may be appellate review of a statutorily permissible sentence only if the District Court has either relied on improper considerations in imposing the sentence, or has relied upon materially incorrect information.

It is respectfully submitted that the District Court relied upon an improper consideration in the imposition of the sentence here.

Although the Appellant pleaded guilty only to the giving of an unlawful gratuity, it appears from the record that Judge Bramwell took into consideration another count of the indictment, which charged the Appellant with income tax evasion, a much more

serious offense, at the time of sentence. This was done even though the income tax evasion charge was dismissed immediately after the sentencing. (12/9 Tr., p. 17).

It was the Court's position that the unlawful gratuity was a result of the Appellant's attempt to evade the payment of income tax. (12/9 Tr., p. 10). Judge Bramwell, although stating that the tax evasion charge was not before the Court, felt that the tax evasion charge could not be wholly unfounded because "if that was so this case wouldn't be here". (12/9 Tr., p. 10). The Court further stated that "the arrangements (i.e., gratuity) were made for this situation" (i.e., tax evasion). (12/9 Tr., p.10).

It is submitted that the District Court committed reversible error by considering, at the time of the sentencing of Appellant, a serious charge which was several minutes later dismissed and which the Appellant consistently denied. (9/22 Tr., p. 9).

Because of the vast cooperation of the Appellant with various governmental prosecutorial agencies, which cooperation is continuing even to this minute, and the fact that the Appellant was a passive participant in the crime to which he pleaded guilty, it is submitted that the District Court should have followed the suggestions of this Court and stated his reasons for imposing a prison sentence upon the critically ill Appellant. United States v. Brown, 479 F.2d 1170, 1172 (2nd Cir. 1973)

To do otherwise is to exact retribution from the Appellant.

But, as the Supreme Court has stated, retribution has lost its importance in our society:

"Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." Williams v. New York, 337 U.S. 241, 248 (1949).

CONCLUSION

THE DISTRICT COURT'S FINDING OF FACT AS TO APPELLANT'S HEALTH SHOULD BE REVERSED, OR, IN THE ALTERNATIVE, THE CAUSE SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING BASED ONLY ON PROPER CONSIDERATIONS.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

PETER J. FABRICANT, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 186 Joralemon Street, Brooklyn, New York.

On March 9, 1976, deponent served the within Brief and Appendix, United States of America v. Jerome Daniels, Index Number 76-1078, upon David J. Ritchie, attorney for the United States Government, at Organized Crime and Racketeering Section, Federal Building, Room 327-A, 35 Tillary Street, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office within the State of New York.

Deponent further filed an original and ~~seven~~ three copies of the aforementioned Brief and Appendix with the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York 10007, by depositing the originals and true copies of same enclosed in a post-paid properly addressed wrapper in a post office within the State of New York.

Peter J. Fabricant
PETER J. FABRICANT

Sworn to before me this
9th day of March, 1976

Christine A. Scott

CHRISTINE A. SCOTT
Notary Public, State of New York
No. 24-1632580
Qualified in Kings County
Commission Expires March 30, 1977